FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 18 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945

Nos. 631 and 671.

THE PEOPLE OF THE STATE OF ILLINOIS EX REL. LEE VAN WOODS,

Petitioner,

vs.

WALTER NIERSTHEIMER, Warden, Illinois State Penitentiary, Menard, Illinois,

Respondent.

BRIEF FOR RESPONDENT.

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
Attorney for Respondent.

WILLIAM C. WINES,
Assistant Attorney General,
Of Counsel.

CHAMPLIN-SHEALY COMPANY, CHICAGO 388

SUBJECT INDEX.

PAGE

Statement of the Case and of the Issues Presented.... 1-2

Argument:

I. Petitioner had an adequate and exclusively appropriate remedy by coram nobis. Therefore the court's decision rests upon a non-federal ground adequate to support it, and certiorari should be denied 3-9

II. The federal courts will not intervene where the petitioner has an adequate remedy under the state law 9-11

Conclusion 11

TABLE OF U. S. CASES CITED.

Ex Parte Botwinski, 314 U. S. 586..... 10

Ex Parte Hawk, 321 U. S. 114..... 10

House v. Mayo, 324 U. S. 42..... 2, 10

Tomkins v. Missouri, 324 U. S. 485 ..... 2, 11

White v. Ragen, 324 U. S. 760..... 2, 3

Williams v. Kaiser, 323 U. S. 471..... 11

TABLE OF ILLINOIS CASES CITED.

City of Chicago v. Nodeck, 202 Ill. 257..... 5

People v. Dabbs, 372 Ill. 160..... 7

People v. Drysch, 311 Ill. 342..... 5

People v. Green, 355 Ill. 468..... 4, 7

People v. McAnally, 221 Ill. 66..... 8

TABLE OF STATUTES CITED.

Chap. 110, par. 196, Ill. Rev. Stats. 1945..... 2, 3

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945

Nos. 631 and 671.

THE PEOPLE OF THE STATE OF ILLINOIS EX REL. LEE VAN WOODS,

Petitioner,

vs.

WALTER NIERSTHEIMER, Warden, Illinois State Penitentiary, Menard, Illinois,

Respondent.

BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE AND OF THE ISSUES PRESENTED.

This brief is filed in response to this court's specific request therefor.

The petitioner filed two petitions for writs of *habeas corpus*, in substance identical, one in the Circuit Court of Randolph County and one in the Criminal Court of Cook County. In both of these petitions he averred, by charges which we concede to be sufficient in substance to charge

want of due process under this court's holdings,* that he was arrested without probable cause, unlawfully searched; beaten into confessing a murder which he did not commit, assigned counsel who did not make any real effort to represent him, denied an opportunity to call witnesses who were available and whose testimony, if believed, would have exonerated him, and convicted upon a plea of guilty to which he did not knowingly consent.

Both the Circuit Court of Randolph County and the Criminal Court of Cook County denied relief by way of *habeas corpus*. In attempting to obey this court's teachings in *White* v. *Ragen*, 324 U. S. 760, petitioner has sought this court's writ of *certiorari* directly to the Circuit Court and the Criminal Court above mentioned.

But, as we demonstrate in the argument, Illinois affords a plain, speedy and adequate remedy, which it is not within the discretion of the Illinois courts to withhold upon proper pleading and proper proof of facts such as those averred by the petitioner, by a statutory motion in the nature of a writ of *coram nobis* (Ill. Rev. Stats. 1945, Ch. 110, par. 196). In the argument, we demonstrate that the distinction between *coram nobis* and *habeas corpus* is not one of mere nomenclature, that there are important and fundamental differences both in principle and in practical consequences between the two modes of relief, and that *coram nobis*, not *habeas corpus*, is the appropriate and exclusive remedy for the petitioner in this case.

Question Presented

Do the Illinois courts' decision rest upon an adequate non-federal ground that petitioner had a clear and adequate remedy in the nature of a writ of error *coram nobis*, which was exclusive of *habeas corpus*?

---

* *White* v. *Ragen*, 324 U. S. 760, *House* v. *Mayo*, 324 U. S. 42, *Tomkins* v. *Missouri*, 324 U. S. 485, and other recent cases.

ARGUMENT.

I.

Petitioner had an adequate and exclusively appropriate remedy by coram nobis. Therefore the court's decision rests upon a non-federal ground adequate to support it, and certiorari should be denied.

The applicable Illinois statute, which appears at Ch. 110, Par. 196, Ill. Rev. Stats., 1945*, quoted in the margin, abolishes the writ of error *coram nobis* and provides that all errors in fact committed in the proceedings of any court of record which formerly could have been corrected by such writ can now be corrected by the court committing the error upon motion in writing. The motion must be made within five years with certain exceptions, one of which is made for persons who are under duress, in which case the five years run from the time the duress ceases.

In *White* v. *Ragen*, 324 U. S. 760, the question whether the Illinois statutory substitute for *coram nobis* afforded a plain, speedy, adequate and exclusively appropriate remedy in cases like the present one, was presented and argued but not reached because *White* v. *Ragen* and the companion case of *Lutz* v. *Ragen* were original proceedings in the Supreme Court of Illinois, and this court took cognizance of the Illinois rule that the Illinois Supreme Court does

* "The writ of error *coram nobis* is hereby abolished, and all errors in fact, committed in the proceedings of any court of record, and which, by the common law, could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing, made at any time within five years after the rendition of final judgment in the case, upon reasonable notice. When the person entitled to make such motion shall be an infant, non compos mentis or under duress, at the time of passing judgment, the time of such disability shall be excluded from the computation of said five years."

not entertain petitions obviously tendering controverted issues of fact, remitting petitioners in such cases to *habeas corpus* in state trial courts of general jurisdiction where *habeas corpus is appropriate at all.*

But in speaking of the respondent's (the warden's) contention in the *White* and *Lutz* cases that *habeas corpus*, even in the trial courts of general jurisdiction, would not have lain because *coram nobis* was the exclusively appropriate remedy, this court said:

> "* * * We do not reach the alternative argument, made by the Attorney General, that petitioners' remedy in the state courts is not habeas corpus, but the statutory substitute for the writ of error *coram nobis*, Ill. Civil Practice Act, § 72, Smith-Hurd Stats. c. 110, § 196, and that the two remedies are mutually exclusive."

This question, not reached in the *White* and *Lutz* cases, is the only question presented in the instant case. We submit that the considerations hereafter briefly developed clearly demonstrate that under the jurisprudence of Illinois, *coram nobis* is available to the petitioner in the instant case as an absolute matter of right and is the only remedy available, and that therefore *certiorari* should be denied.

The case of *People* v. *Green*, 355 Ill. 468, is precisely apposite. We respectfully bespeak attention to its teaching. A study of that case peremptorily disposes of any question as to the availability of the statutory proceeding called *coram nobis*. In that case, petitions had been filed under the *coram nobis* provision above quoted, setting forth that, to quote the language of the Supreme Court of Illinois at page 470, "the defendant was not represented by counsel" and that evidence could be produced showing that he was not guilty of the charge. In each of several cases involved, the trial court vacated the judgment and granted a retrial of petitioner. The Illinois

Supreme Court case, was not an appeal from the *coram nobis* judgment (although appeal is available, see *post*) but an original petition by the state for *mandamus* to compel expunction of the orders vacating the original judgments.

The Supreme Court of Illinois said at page 473:

> "A writ of error *coram nobis*, or a motion under the statute, is an appropriate remedy in criminal cases as well as civil and lies to set aside a conviction obtained by duress or fraud, or where by some excusable mistake or ignorance of the accused, or without negligence on his part, he has been deprived of a defense which he could have used at his trial, and which, if known by the court, would have prevented conviction. (*People* v. *Crooks, supra; Sanders* v. *State*, 85 Ind. 318, 44 Am. Rep. 29; *State* v. *Calhoun, supra;* 2 R. C. L. sec. 266; 18 L. R. A. 842, note; *People* v. *Perez*, 98 Pac. (Cal.) 870.) Since the judgment entered upon such proceeding is final and the proceeding is civil in its nature, either the State or the defendant is entitled to a review of the judgment of the court entered on such motion or petition."

This case plainly charts appropriate practice.*

Another case that is directly in point is *People* v. *Drysch*, 311 Ill. 342. It states very clearly and precisely that, in cases like the instant ones, relief by way of *coram nobis* is peculiarly appropriate.

In the *Drysch* case it was contended that certain witnesses testified perjuriously and fraudulently. **In the Drysch case, there was no showing that any public official was privy to the fraud upon the courts.** The petitioner in the *Drysch* case relied upon the case of *City of Chicago* v. *Nodeck*, 202 Ill. 257. In the *Nodeck* case **there was a show-**

---

* "In *People* v. *Crooks, supra*, it was held that the sufficiency of the motion or petition may be raised by demurrer, plea of *nullo est erratum*, by motion to dismiss, by pleading special matters in confession and avoidance, or by making an issue of fact by traversing the allegations. Such was likewise the holding of this court in *Harris* v. *Chicago House Wrecking Co., supra.*" *People* v. *Green*, 355 Ill. 468, at 475.

ing not only of fraud but of complicity on the part of counsel for one of the parties. The Supreme Court of Illinois, distinguishing the *Drysch* case from the *Nodeck* case upon grounds which are fatal to the petitioner in the instant cases, said at pages 348-349 (Emphasis supplied):

> "The defendant argues the proposition that where a verdict is obtained by the admitted perjury of a witness it may be ground for vacating the judgment even after the judgment term, citing *City of Chicago* v. *Nodeck*, 202 Ill. 257. It is held in that case that a court has power to vacate a judgment at any time after the expiration of the term where the court was without jurisdiction to enter the judgment, and also that where a judgment has been obtained through fraud, such fact constitutes a sufficient reason for vacating it after the term in which it was rendered. **The fraud, however, must be a fraud committed by one of the parties on the court and not the perjury of a witness.** In the case cited the fraud was the fraud of the City of Chicago, one of the parties to the suit. * * *"

In other words, the Illinois rule is that if *without the privy of any party to the suit*, a witness commits perjury, due process is not denied and neither *coram nobis* nor any other remedy is appropriate; for it is the purity of the tribunal and of public officers, not that of the witnesses who testified before it, that is required by due process. But if, as the petitioner charges is the fact in the instant cases, the imposition upon the court, either by the profferance of perjured testimony or the suppressing of truthful testimony, is accomplished by the *connivance of the parties*, the judgment may be vacated. Of course, the complicity of public officials acting on behalf of the state in denying petitioners an opportunity intelligently to plead to an indictment and to procure witnesses, constitutes a denial of due process. Therefore, under the holding of the *Drysch* case, *coram nobis* is available as a matter of right, and not as a matter of grace; and the court has no discretion to deny it.

Another case that is much in point is *People* v. *Dabbs*, 372 Ill. 160, holding that the statutory proceeding in the nature of *coram nobis* is available where the petitioner claims that "he was fraudulently deprived of his liberty by failure of the state's attorney to inform the court that Hughes was feebleminded, and therefore an incompetent witness against the defendant." Although the claim was held not to be supported by the evidence, the proceeding was regarded as appropriate. In other words, the *Dabbs* case (372 Ill. 160, *supra*) holds that unfair suppression of evidence affords a right to relief by *coram nobis*.

The distinctions between *coram nobis* and *habeas corpus* are important and substantial.

In the *first* place, the *coram nobis* proceeding must be instituted in the court wherein the judgment was rendered. This would mean that, in the instant case, the petitioner's charges, serious if true, would be tried in the venue where, at least presumably, the witnesses and counsel reside.

In the *second* place, the doctrine of *res judicata* attaches to the *coram nobis* proceeding **and an appeal lies from such judgment**, which is not the case with *habeas corpus*. This means that, under the *coram nobis* practice, either the petitioner or the state has a right to review by the Supreme Court of Illinois of the decision of the trial court. (*People* v. *Green*, 355 Ill. 468, already cited, recognizes the finality of judgments upon *coram nobis* by pointing out that the state might appeal from them.) But in Illinois, as at common law, the doctrine of *res judicata* does not apply to judgments refusing a writ of *habeas corpus*. Had either of the trial courts entertained the instant petitions and discharged the prisoner, the state would have had no appeal to or writ of error from the Supreme Court of Illinois. (*Mandamus*

would have been appropriate to expunge the order freeing the prisoner if the order were void, as distinct from erroneous, but not otherwise. But the important right to review for error, as distinct from invalidity, which is available to both parties on *coram nobis* is available to neither on *habeas corpus*.

In *People* v. *McAnally*, 221 Ill. 66, it is said of *habeas corpus* at page 68, that "an order in one proceeding before either a court or a judge thereof is not a final order from which an appeal or writ of error would lie and could not be pleaded as a bar to another or further proceeding." This means that, if Illinois is bound to afford the petitioner a remedy not by *coram nobis* but by *habeas corpus*, then it must afford him an infinite number of such remedies, for he has a right to file as many petitions for *habeas corpus* as he chooses, even in the same courts. *Every time that he makes his charges, they must be reinvestigated de novo by* subpoena of the presiding judge, all counsel, and all other witnesses.

It may be suggested that the petition in the instant case filed in the Criminal Court of Cook County could and should have been treated as a petition for writ of error *coram nobis*. But the petition had none of the fundamental or essential requisites of an application for release in the nature of *coram nobis*. It was directed against the warden, as respondent, and not filed in the cases in which the petitioner was convicted. This distinction is not merely a formal one. It did not contemplate the process or notice against the State of Illinois, as plaintiff, and against the State's Attorney's office, which is always necessary in *coram nobis*. *Coram nobis is a contention of the adversary* proceeding by the People of the State of Illinois and the respondent. *Habeas corpus* lies against any person who, as an individual, wrongfully imprisons the relator. The

circumstance that the respondent is frequently a public official and acts under the color of purported legal process, does not implead the People of the State of Illinois as parties to the controversy. It is doubtless for this reason, among others, that *res judicata* is not predictable of decisions in *habeas corpus* proceedings.

Needless to say, the application in Randolph County could not be treated as an application for *coram nobis;* for the court in that county was not the court in which the petitioner was convicted and in which the State had a right to be heard in opposition to his application.

Thus, the applications in the instant cases cannot be treated as constructively or in substance an application for *coram nobis.* And the question as to what requisites are sufficient to constitute a petition for *coram nobis* as distinct from an application for *habeas corpus,* are, of course, questions of state procedure and therefore of state, not federal, law.

The simple truth is—and this is decisive of the instant cases—that petitioner did not resort to the plain, simple, adequate and speedy remedy afforded by the statutory proceedings in the nature of *coram nobis.*

It will thus be seen that the distinction between *coram nobis* and *habeas corpus* is, in Illinois, one of substance and not one of mere form.

II.

The federal courts will not intervene where the petitioner has an adequate remedy under the state law.

It should be observed that, although the federal courts will usually forbear the issuance of a writ of *habeas corpus* at the behest of a state prisoner where he has an adequate

remedy under state law (*Ex Parte Hawk*, 321 U. S. 114), still, since *habeas corpus*, whether in a state or a federal court, is an original proceeding, this or any other federal court has jurisdiction, however sparingly it may be exercised, to entertain *habeas corpus* petitions where the ground alleged is an invasion of federal rights.

But where the petitioner seeks to review a decision of the state courts by *certiorari*, then, if the state court has refused the writ on the ground that some other state remedy is appropriate and available, such refusal by the state court rests upon an adequate non-federal ground and this court abstains from review not out of considerations of comity or judicial policy but **because of want of jurisdiction.** The want of jurisdiction proceeds from the absence of a federal question.

In *House* v. *Mayo*, 324 U. S. 42, this court specifically held that the federal court should have paid no attention to this court's denial of *certiorari* "where" as this court said at page 48, "the basis of the state court decision is that the particular remedy is not one allowed by state law, for in such a case this court **lacks jurisdiction to review the decision.**"

Ex Parte Botwinski, 314 U. S. 586 is controlling. We quote in full the text of the *per curiam* opinion:

> "It does not appear that petitioner has exhausted his state remedies by applying for a writ of error *coram nobis*. *State ex rel. Dowd* v. *Superior Court of La Porte County*, 36 N. E. 2d 765; *State ex rel. Kunkel* v. *Circuit Court of La Porte County*, 209 Ind. 682, 200 N. E. 614. The motion for leave to file a petition for writ of *habeas corpus* is therefore denied without prejudice. *Mooney* v. *Holohan*, 294 U. S. 103."

It thus appears that the petitioner has a plain, speedy and adequate remedy under the law of Illinois. That rem-

edy is exclusive. Therefore the judgments in the instant cases rest upon an adequate non-federal ground of decision.

It is not necessary that this ground be stated if it fairly appears from a study of the general jurisprudence of the state. In *Williams* v. *Kaiser*, 323 U. S. 471, and *Tomkins* v. *Missouri*, 324 U. S. 485, this court, going beyond the judgments under review, consulted and studied the statutes and decisions of Missouri in an effort to ascertain whether there were any relevant principles or rules of Missouri's jurisprudence which, even though such rules were not referred to in the opinions or the judgments, might fairly appear to support the judgments. It found no such statutes or rules in Missouri. But the Illinois statutes and the Illinois rules appear from the foregoing consideration.

Conclusion.

It is therefore respectfully submitted that these petitions for *certiorari* should be denied.

Respectfully submitted,

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
Attorney for Respondent.

WILLIAM C. WINES,
Assistant Attorney General,
Of Counsel.